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CITATIONS

706-256—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 22

JAMES P. WESBERRY, JR., ET AL., APPELLANTS

v.

CARL E. SANDERS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (R. 36–55) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on June 20, 1962 (R. 36, 51). The notice of appeal to this Court was filed on August 17, 1962 (R. 55–56), and probable jurisdiction was noted on June 10, 1963 (R. 56). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

The Fifth Congressional District of Georgia has, according to the 1960 census, 823,680 inhabitants, while the least populous Congressional district in Georgia has 272,154 inhabitants. A three-judge federal district court dismissed an action challenging the constitutionality of the districting under the Fourteenth Amendment and Article I, Section 2, on the ground of want of equity. The questions presented are:

1. Whether the federal courts have power to consider claims, resulting from such grossly unfair districting, of denial of equal protection and due process under the Fourteenth Amendment and of rights protected by Article I, Section 2.

2. Whether the district court properly dismissed the action for want of equity.

INTEREST OF THE UNITED STATES

This case involves the power and discretion of the federal courts to consider whether Congressional districting within a State violates the Fourteenth Amendment. The government participated in *Baker* v. *Carr*, 369 U.S. 186, which presented the parallel question whether the federal courts could consider the constitutionality of the apportionment of state legislatures. Both cases directly concern the basic right in a democracy to fair representation in one's own government. The federal government's interest is perhaps even greater in this case than in *Baker* v. *Carr* since fair representation in the federal legislature, Congress itself, is involved.

STATUTES INVOLVED

Section 2a of Title 2 U.S.C., 55 Stat. 761, which provides for the decennial reapportionment of the House of Representatives, is set forth in the Appendix, pp. 45–46.

Section 2301 of Title 34, Georgia Code, which establishes the Congressional districts in Georgia, is set forth in the Appendix, pp. 46–48.

STATEMENT

1. *The Complaint.*—Plaintiff-appellants, two citizens of the United States and of Georgia, are residents and qualified voters of Fulton County and the Fifth Congressional Election District of Georgia, which consists of Fulton (where Atlanta is located), DeKalb, and Rockdale Counties (R. 21–22, 57). They filed a class action on April 17, 1962, in the United States District Court for the Northern District of Georgia, on behalf of all qualified voters of the Fifth Congressional Election District and all qualified voters of Georgia who are or may become similarly situated (R. 1–17). Plaintiffs sought the vindication of voting and representation rights, allegedly debased by the failure of the Georgia General Assembly to realign the ten Congressional districts in accordance with the population of the State so as to equalize more nearly the population of the several districts (R. 1–17). The defendants are sued in their representative capacities as officials charged by law with the performance of duties in connection with elections (R. 1, 2). The action was brought under 42 U.S.C. 1983 and 1988,

and jurisdiction was asserted under 28 U.S.C. 1343(3). (R. 2-3).

Plaintiffs alleged that 34 Ga. Code 2301 (see the Appendix, *infra*, pp. 46-48), the districting statute which was enacted in 1931, is arbitrary, capricious, and invidiously discriminatory since it results in gross inequalities in the number of inhabitants of the various Congressional districts, thereby depriving plaintiffs and others similarly situated of the full value of their right to vote (R. 8-11). They emphasized in particular that the Fifth District, where they resided, was seriously discriminated against since it had over three times the population of the least populous district. Plaintiffs claimed that the "reduction of the effectiveness" of their votes results in denial of equal protection of the laws and in denial of liberty and property without due process of law in contravention of the Fourteenth Amendment; violates Article I, Section 2 of the Constitution, which guarantees the right to vote for Congressmen and to have those votes "fully counted"; and violates the privileges and immunities clause of the Fourteenth Amendment by depriving them of the full exercise of the voting privilege guaranteed by Article I, Section 2 (R. 11-12).

Plaintiffs requested the convocation of a three-judge district court under 28 U.S.C. 2281, *et seq.* They sought (1) a declaratory judgment that the "existing Congressional malapportionment" has deprived, and continues to deprive, them of rights guaranteed by the Fourteenth Amendment, and that 34 Ga. Code

2301 violates the Fourteenth Amendment and Article I, Section 2 of the Constitution; (2) a prohibitory injunction restraining the defendants and their successors in office from conducting Congressional elections based on the present districts; and (3) unless the General Assembly of Georgia redistricts upon an "equitable and representative" basis, a mandatory injunction directing the defendants to conduct Congressional elections at-large until the General Assembly enacts proper redistricting legislation (R. 14–16).

2. *The Pre-Decision Proceedings in the District Court.*—The defendants' answer to the complaint alleged that the district court had no jurisdiction over the subject matter of the case; that the complaint failed to allege a claim upon which relief could be granted; and that the complaint failed to join indispensable parties (R. 18). Defendants also denied the material, conclusionary allegations of the complaint (R. 18–20). A three-judge district court consisting of Circuit Judges Elbert P. Tuttle and Griffin B. Bell and District Judge Lewis R. Morgan was convened. At the trial on May 23, 1962, testimonial and documentary evidence was introduced (R. 21–35, 37–139), which may be summarized as follows:

a. The defendants stipulated that the plaintiffs were residents and qualified voters of Fulton County and entitled to vote for Congressional candidates for election from the Fifth Congressional District (R. 21–22).

b. The documentary evidence included listings of Congressional districts in the United States according

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to population (R. 79–92); percentage deviations of each State's Congressional districts from the average population per district in the State (R. 93–106); percentage deviations of each State's Congressional districts from the average population per district ranked on a national basis (R. 107–121); and a state-by-state table of Congressional district populations based on the 1960 census (R. 122–137). The table below shows the 1960 population of each of Georgia's Congressional districts, the percentage deviation of each district from the average population per district in Georgia, and the ratio of the population of the most populous (*i.e.*, most under-represented) district to the population of the other nine districts (see R. 95, 124–125).

District	Dist. pop. (1960)	Percentage deviation from avg. pop. per dist. (avg. pop. 394,312)	Ratio of pop. of most under represented dist. (the 5th) to pop. of other nine dists.*
5th	823,680	108.89	
7th	450,740	14.31	1.82 to 1.
3rd	422,198	7.07	1.95 to 1.
1st	379,933	−3.64	2.16 to 1.
10th	348,379	−11.64	2.36 to 1.
6th	330,235	−16.25	2.49 to 1.
4th	323,489	−17.96	2.54 to 1.
2nd	301,123	−23.63	2.73 to 1.
8th	291,185	−26.15	2.82 to 1.
9th	272,154	−30.97	3.02 to 1.
Total pop	3,943,116		
Pop avg. dist	394,312		

* These figures, like those in the table on p. 7 below, are computed by dividing the population of each of the other nine districts into the population of the Fifth District.

The table below shows, as of 1931 when 34 Georgia Code 2301 was enacted, the population figures of the

ten Congressional districts, their percentage deviations from the average population per district, and the ratio of the population of the most populous district to the population of the other nine districts (see R. 39).

District	1960 population	Percentage deviation from avg. pop. per dist. (avg. pop. 289,176)	Ratio of pop. of most under-represented dist. (the 5th) to pop. of other nine dists.
5th	396, 112	57. 72	
3d	339. 870	17. 52	1.16 to 1.
1st	328, 214	13. 49	1.20 to 1.
10th	289, 267	0. 00	1.36 to 1.
6th	281, 437	−02. 67	1.40 to 1.
7th	271, 680	−06. 05	1.45 to 1.
2d	263, 606	−08. 84	1.50 to 1.
4th	261, 234	−09. 66	1.51 to 1.
8th	241, 847.	−16. 36	1.63 to 1.
9th	218, 496	−24. 44	1.81 to 1.
Total pop	2, 891, 763		
Avg. pop. dist	289, 176		

Out of the 413 Congressional districts in the nation in January 1963,[1] the Fifth District of Georgia ranked as the second most populous, while the Ninth District of Georgia ranked 387th (R. 79, 91).[2] As of January 1963, Georgia had a maximum disparity of over three to one between its most under-represented and most

[1] Twenty-two representatives were elected at-large in 1962: Alabama (8), Alaska (1), Connecticut (1), Delaware (1), Hawaii (2), Maryland (1), Michigan (1), Nevada (1), New Mexico (2), Ohio (1), Texas (1), Vermont (1), and Wyoming (1) (R. 92).

[2] The Fifth District of Texas, with a 1960 population of 951,527, was the most populous Congressional district in the nation as of January 1963 (R. 79). The least populous district at that time was the 12th district of Michigan with a 1960 population of 177,431 (R. 92).

over-represented Congressional districts, which was the 6th highest disparity in the nation (R. 139).[3]

3. *The Decision of the District Court.*—On June 20, 1962, the district court, one judge concurring in part and dissenting in part, dismissed the complaint (R. 36–55). The court held that it had jurisdiction over the cause, that the plaintiffs had standing to bring the suit, and that the question presented was justiciable (R. 44). The court then pointed out that 34 Ga. Code 2301, when enacted in 1931, "reflected a rational state policy to set up the congressional districts in Georgia with some reasonable relation to population" (R. 45). However, the court went on to note that the Fifth District is now "grossly out of balance" with the nine other Congressional districts in Georgia, and that Section 2301 "reflects a system which has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard" (R. 40, 45). The court stated that since it had recently required the Georgia General Assembly to be fairly apportioned (*Toombs v. Fortson*, 205 F. Supp. 248), "[i]t may well be that the arbitrariness which [the court] find[s] to be present as the statute relates to the Fifth District * * * will be corrected by the reapportioned Assembly" (R. 45). For this reason, the court said that it would have refused to decide whether the Constitution was violated, and denied

[3] Georgia's disparity was exceeded only by that of Michigan and Texas, which were over four to one, and Arizona, Colorado, and Ohio, which like Georgia were over three to one (R. 139).

relief at this time but retained "jurisdiction to again consider the contentions of plaintiffs, if necessary, after the expiration of a reasonable time for relief by way of political remedy" (R. 45).

The court, however, did not retain jurisdiction. Instead, it dismissed the action on the ground of want of equity. Relying on *Colegrove* v. *Green*, 328 U.S. 549, the court said that "[w]e are not dealing simply with state action under the Fourteenth Amendment or in violation of Art. I, Section 2 of the Constitution for the state action complained of is inextricably subject to the rights allocated to Congress under the Constitution" (R. 45). The court pointed out that this Court, in *Gomillion* v. *Lightfoot*, 364 U.S. 339, and *Baker* v. *Carr*, 369 U.S. 186, gave "preservative treatment" to *Colegrove*, and that *Baker* v. *Carr* "goes no further than to open the doors of the courts for the purpose of adjudicating consistency of state action with the Federal Constitution where no question is concerned involving a coequal political branch of the government" (R. 49–50). Consequently, while the court said that it did not deem *Colegrove* "to be a precedent for dismissal based on the non-justiciability of a political question involving the Congress," it concluded that it was "strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for

the state; relief may be forthcoming from a properly apportioned legislature; and relief may be afforded by the Congress" (R. 50–51). The court then dismissed for want of equity (R. 51).

Circuit Judge Tuttle concurred in that part of the court's opinion denying injunctive relief because there was "no reasonable likelihood that the Georgia Legislature as properly constituted will fail in the future to rectify the gross inequalities that [the court] find[s] now exist in the Georgia Congressional Districts" (R. 52). He dissented from the holding of the majority that the federal courts have "no power to take cognizance of such a situation and declare the state apportionment laws unconstitutional" (R. 52). Judge Tuttle pointed out that neither *Baker* v. *Carr* nor *Colegrove* v. *Green* denied the authority to the federal courts to grant relief as to Congressional districting where the proof establishes a right to equitable relief from grossly disproportionate districting (R. 53–54). And he emphasized that (R. 54):

> Complete relief can be granted to the plaintiffs here without the slightest interference with prerogatives or powers of the Federal Congress. That body, under the reapportionment statutes referred to in the majority opinion, has directed the State of Georgia to divide the people of the State into congressional districts. Presumably Congress intended for the State to do so within constitutional standards. The fact that Congress did not expressly prescribe that congressional districts should be reasonably equal as to population does not, of course, prevent the State from districting according to

equal population, nor, it seems to me, does it excuse the State from failing to do so if a failure to do so works an unconstitutional deprivation on the plaintiffs.

Plaintiffs noted an appeal to this Court (R. 55–56). On June 10, 1963, the Court noted probable jurisdiction (R. 56).

SUMMARY OF ARGUMENT

I

The federal courts have power to consider actions challenging Congressional districting under the Fourteenth Amendment.

A. The district court had jurisdiction of the subject matter. General jurisdiction is clearly conferred by 28 U.S.C. 1343 which gives the district courts jurisdiction of any civil action to secure redress of a violation of constitutional rights under color of state authority. *Baker* v. *Carr*, 369 U.S. 186, upheld the jurisdiction of the federal courts over suits involving the malapportionment of state legislatures; the same equally applies to suits attacking Congressional districting. Indeed, this Court has repeatedly entertained such suits on the merits. *E.g.*, *Smiley* v. *Holm*, 285 U.S. 355.

B. The plaintiffs had standing to maintain this action for they seek to vindicate personal rights. Again, *Baker* v. *Carr* is controlling. Moreover, the Court has repeatedly entertained suits like this one where the plaintiffs were voters challenging the Congressional districting of their State.

C. The controversy is justiciable. In *Baker* v. *Carr*, 369 U.S. at 210, the Court said that the determination, whether an issue was a political question and therefore non-justiciable is "primarily a function of the separation of powers." In contrast to the matter involved there, the apportionment of a state legislature, Congressional districting does involve a coequal branch of the government and is within the power of Congress under Article I, Sections 4 and 5. On the other hand, a state statute is under attack here so that this action cannot cause actual interference with Congress.

Although a coequal branch of the government is to some extent involved, this Court's decisions clearly establish that Congressional districting is justiciable. First, there is no indication that the power conferred by the Constitution on Congress to regulate Congressional elections is exclusive; the mere existence of Congressional power has never been considered a bar to the courts invalidating state activity in violation of the Constitution. See *Gibbons* v. *Ogden*, 9 Wheat. 1. Second, the courts have found in other cases that constitutional rights have been violated by state officials miscounting votes and stuffing ballot boxes in Congressional elections. *E.g., United States* v. *Classic*, 313 U.S. 299. Third, the Court has repeatedly considered cases involving Congressional districting (*e.g., Smiley* v. *Holm, supra*) and in one case a majority of the Court held that the issue was justiciable (*Colegrove* v. *Green*, 328 U.S. 549). And fourth, *Baker* v. *Carr* states that cases involving Congressional districting are justiciable.

Even if this Court had not explicitly stated in *Baker* v. *Carr* that Congressional districting is justiciable, this result would follow from the Court's holding that cases involving state legislative malapportionment are justiciable. For on the crucial matters relating to justiciability, remedies and substantive standards, the problems are less serious as to Congressional districting. Elections-at-large are entirely practicable in the election of Congressmen and have been upheld at least four times by various courts, including twice by this Court, in cases challenging districting. And whatever other factors besides population may arguably be considered as to state legislative apportionment, the language and history of the Constitution make clear that Congressional districts must be as equal in population as possible.

II

The district court erred in dismissing for want of equity. There are no particular facts in this case suggesting any reason why the federal courts should not exercise their jurisdiction. Although Mr. Justice Rutledge in *Colegrove* v. *Green, supra,* found a want of equity in that case because of the imminence of the election, there is no such problem here. As indicated above, an election at large is one practical remedy. There is no problem of interference with Congress since it has not acted in this field and there is no indication that it will act. While it is possible that the state legislature might have amended the statute, this is justification merely for delaying relief, not for dismissing the suit.

III

The district court, in dismissing for want of equity, did not make clear its view of the merits. If, as we have argued, the court erred, the case should be remanded to the district court for determination of the substantive issues.

ARGUMENT

Introduction

This case involves the right of all Americans to fair participation in the legislative branch of their own national government. The Constitution gives each State a minimum of one representative in the House of Representatives and apportions the other seats among the various States entirely on the basis of population. Article I, Section 2. Each state legislature then either divides the State into single-member districts or, in a few instances, decides to have one or more Congressmen elected at large. See 2 U.S.C. 2a, Appendix, pp. 45–46. In some States the legislatures have either deliberately districted in a discriminatory manner—*i.e.*, have included substantially more people in one district than another—or this has been the result of the passage of time since the last districting.

The particular Congressional districting involved in this case is that in Georgia. The Georgia legislature last districted in 1931 by dividing the State into 10 districts. Even at that time, the Fifth District, including Atlanta and its suburbs, was seriously discriminated against, having 396,112 people as contrasted to 218,496 in the least populous district.

Since that time, the Fifth District has grown to 823,680 people, while the least populous district has only 272,154 people, a ratio of over 3 to 1. Stated differently, the Fifth District has approximately one-fifth the population of the State, but only one-tenth the Congressmen, a denial of one-half its proper representation in the House of Representatives.

The initial issue in this case involves the power of the federal courts to consider whether Congressional districting within a particular State is consistent with the Fourteenth Amendment. In *Baker* v. *Carr*, 369 U.S. 186, this Court held that the federal court could entertain actions challenging the apportionment of state legislatures. We shall show below that, both under the authority of *Baker* v. *Carr* and considered independently, the federal courts have the similar power to consider the constitutionality of Congressional districting—that they have jurisdiction, that the persons whose votes have been diluted have standing to bring an action, and that the controversy is justiciable.

We then show that the district court erred in dismissing the action for want of equity. On the contrary, we submit, this is an appropriate case for the federal courts to exercise their equitable discretion and consider the alleged violation of the Fourteenth Amendment on the merits.

Finally, we state the government's position that the Court need not reach the merits at this time, but that, instead, this case should be remanded to the district court for further proceedings.

I

THE FEDERAL COURTS HAVE POWER TO CONSIDER ACTIONS CHALLENGING CONGRESSIONAL DISTRICTING UNDER THE FOURTEENTH AMENDMENT

In *Baker* v. *Carr*, 369 U.S. 186, this Court held that the federal courts have power to consider whether a state legislature is constitutionally apportioned. The district court, relying on *Baker v. Carr*, held that the federal courts equally have the power to consider the constitutionality of Congressional districting. Accord, *Thigpen* v. *Meyers*, 211 F. Supp. 826, 829–830 (W.D. Wash.). We submit that this determination was correct.

A. THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER

Section 1343 of Title 28 U.S.C. provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *." Section 1983 of Title 42 U.S.C. provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In *Baker* v. *Carr*, the complaint alleged that malapportionment of seats

in the Tennessee legislature deprived the plaintiffs—citizens residing in areas alleged to be underrepresented—of equal protection of the laws and due process under the Fourteenth Amendment. This Court held that such an allegation provides the necessary basis for federal jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983. 369 U.S. at 198–204.

In this case, the plaintiffs likewise brought suit under 28 U.S.C. 1343 and 42 U.S.C. 1983. They alleged that Georgia's Congressional districting system violates the Fourteenth Amendment because of the disparity which it creates between the weight and influence of the plaintiffs' votes and the weight and influence of the votes of other persons residing in Georgia. Thus, the claim in this case closely resembles the claim for relief involved in *Baker* v. *Carr*. The difference between a Fourteenth Amendment claim arising out of the malapportionment of seats in a state legislative body and a Fourteenth Amendment claim challenging discriminatory Congressional districting is plainly immaterial for purposes of jurisdiction of the subject-matter.

In *Baker* v. *Carr*, this Court relied on numerous cases involving Congressional districting to sustain federal court jurisdiction in the analogous field of apportionment of state legislatures. These cases are directly in point as to jursidiction in the instant case, which involves Congressional districting. In *Davis* v. *Ohio*, 241 U.S. 565, the Court overruled a contention that a referendum, conducted pursuant to Ohio law, which rejected a Congressional redistricting statute

previously passed by the state legislature was invalid because the Constitution entrusted districting to the state legislatures alone. In affirming the judgment below, the Court expressly refused to dismiss for want of jurisdiction in view "of the subject-matter of the controversy and the Federal characteristics which inhere in it * * *." *Id.* at 570. In numerous other cases, the Court has likewise entertained the merits, and in some cases, granted relief, in actions challenging Congressional districting in various States. For example, in *Wood* v. *Broom*, 287 U.S. 1, the Court considered, although it rejected on the merits, a contention that Mississippi's Congressional districts violated the 1911 apportionment Act of Congress because they were not composed of compact and contiguous territories, having as nearly as practicable the same number of residents.[4] Accord, *Smiley* v. *Holm*, 285 U.S. 355; *Koenig* v. *Flynn*, 285 U.S. 375; *Carroll* v. *Becker*, 285 U.S. 380; *Mahan* v. *Hume*, 287 U.S. 575.[5]

In *Colegrove* v. *Green*, 328 U.S. 549, this Court refused to consider an attack on Congressional dis-

[4] The concurring opinion of four Justices in *Wood* v. *Broom* would have dismissed for want of equity rather than deciding the merits. 287 U.S. at 8–9. However, since the question of equitable discretion, like the merits, is logically reached only after the initial question of jurisdiction, that opinion likewise assumed that jurisdiction existed.

[5] Since *Mahan* v. *Hume* was brought to this Court after the election, the Court signified that the cause was moot by citing *Brownlow* v. *Schwartz*, 261 U.S. 216. However, by also citing *Wood* v. *Broom*, the Court made clear that it considered and rejected appellee's contentions on the merits.

tricting in Illinois on the ground that the great variations in population between districts violated the right of voters in the underrepresented districts to equal protection. However, four members of the seven-member Court which sat in the case expressly concluded that the federal courts had subject-matter jurisdiction. *Id.* at 565, note 2, 568.* In a later attack on Illinois' Congressional districting, the Court dismissed *per curiam* for want of a substantial federal question (without citing authority or giving any reason), rather than for lack of jurisdiction. *Colegrove* v. *Barrett*, 330 U.S. 804.

The only exceptions to the principle that federal courts have jurisdiction over all actions based on a claim arising under the federal Constitution are cases in which the federal claim is patently frivolous, or is immaterial and made solely for the purpose of obtaining federal jurisdiction over a state cause of action. *E.g.*, *Water Service Co.* v. *Redding*, 304 U.S. 252; *Norton* v. *Whiteside*, 239 U.S. 144. The present case does not fit either exception. Whatever its ultimate merit, the complaint is squarely and exclusively founded upon the Fourteenth Amendment and Article I, Section 2. We discuss below (pp. 30–35) our contention that, at the very least, plaintiffs raise a substantial claim that Georgia's Congressional districting is unconstitutional. It is sufficient at this point to say that this discussion shows clearly that the issue

* As the Court said in *Baker* v. *Carr*, *supra*, 369 U.S. at 202, it is doubtful that even the dissent in *Colegrove* questioned the subject-matter jurisdiction of the federal courts since it relied on the majority and concurring opinions in *Wood* v. *Broom*.

is not "so patently without merit as to justify * * * dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 683; see *Hart* v. *Keith Vaudeville Exchange*, 262 U.S. 271, 274; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579. Indeed, the substantiality of the issue is also demonstrated by the determination in *Baker* v. *Carr* that the issue there was not "unsubstantial and frivolous." 369 U.S. at 199. If the claim in *Baker* v. *Carr* was not so insubstantial as to warrant dismissal for lack of jurisdiction, the same is surely the case here.

B. THE PLAINTIFFS HAD STANDING TO MAINTAIN THE ACTION

Baker v. *Carr* also demonstrates that the plaintiffs had standing to maintain this suit. Plaintiffs alleged that they are citizens of the United States and Georgia; that they are residents of the Fifth Congressional District; that they are qualified to vote in Congressional elections (R. 1); and that they are injured by the disparity between the weight and influence of their votes, as residents of the Fifth District, and the votes of other residents throughout Georgia (R. 8–12). Here, as in *Baker* v. *Carr*, the injury which the plaintiffs assert is that the State discriminates against the voters in the area in which they reside, "placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties." 369 U.S. at 207–208. Plaintiffs, like the appellants in *Baker* v. *Carr*, "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely de-

pends for illumination of difficult constitutional questions." *Id.* at 204.

Even before *Baker* v. *Carr*, this Court recognized the standing of private persons to bring an action in federal courts in circumstances similar to the present case. In *Smiley* v. *Holm*, 285 U.S. 355, a unanimous Court reviewed the merits of, and granted relief in, a suit by a Minnesota "citizen, elector and taxpayer" (*id.* at 361) to enjoin the holding of a Congressional election pursuant to a state redistricting statute which violated the federal requirement that redistricting be carried out by the State's lawmaking power, including the approval of the governor. Similarly, in *Koenig* v. *Flynn*, 285 U.S. 375, the Court reviewed on the merits a suit brought by "citizens and voters" (*id.* at 379) of New York for a writ of mandamus to the state Secretary of State to certify that Representatives are to be elected according to districts defined in a resolution of the state legislature. Accord, *Davis* v. *Ohio*, 241 U.S. 565; *Carroll* v. *Becker*, 285 U.S. 380. In *Wood* v. *Broom*, 287 U.S. 1, the Court considered an attack on Mississippi's Congressional districts because they were not compact, contiguous, and nearly as equal in population as practicable which was brought by a "complainant, alleging that he was a citizen of Mississippi, a qualified elector under its laws." *Id.* at 4.

In *Colegrove* v. *Green*, which involved the constitutionality of Illinois' Congressional districts, the dissenting opinion of Mr. Justice Black, in which Justices Douglas and Murphy joined, stated that "appellants had standing to sue, since the facts alleged show

that they have been injured as individuals." *Id.* at 568. Mr. Justice Rutledge, while not explicitly adverting to this issue, in effect assumed standing by basing his concurrence in the result entirely on the ground of want of equity. Thus, a majority of the seven-member Court found or assumed that the plaintiff-voters had standing.[1] The other three members of the Court concluded that the wrong resulting from improper Congressional apportionment was suffered by the State as such rather than by individual voters. *Id.* at 552. This conclusion was based on the characterization of the action as an attempt to "reconstruct the electoral process" of the State "in order that it [might] be adequately represented in the councils of the Nation." *Ibid.* On the other hand, these Justices suggested that individual voters have standing to redress "a private wrong," namely, their "discriminatory exclusion * * * from rights enjoyed by other citizens." *Ibid.* Here, plaintiffs are in no way seeking to vindicate Georgia's rights vis-à-vis the Nation. Instead, they assert that they have been denied representation through the over-representation of other citizens of Georgia. Their sole request is that they themselves receive adequate representation in the councils of the federal government by prohibiting their "discriminatory exclusion * * * from rights enjoyed by other citizens."

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[1] Professor Bickel states that "*Colegrove* is in no sense a standing case. The disadvantaged voters in *Colegrove* were injured, their claim had all the desirable immediacy, and no more suitable plaintiffs are imaginable." Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 40.

C. THE CONTROVERSY IS JUSTICIABLE

In *Baker* v. *Carr*, in discussing the issue of justiciability, the government argued that *Colegrove* v. *Green* did not hold that apportionment issues were political questions and therefore beyond the power of the federal courts. Brief for the United States as Amicus Curiae on Reargument, No. 6, October Term, 1961, pp. 54–61. In addition, we argued that *Colegrove*, even if it had held that cases involving Congressional districting were non-justiciable, did not apply to the situation before the Court in *Baker* v. *Carr*—*i.e.*, malapportionment of a state legislature. *Id.* at 62–65. The principal reason which we gave for the distinction between Congressional districting and state legislative apportionment was that the plurality opinion in *Colegrove* relied heavily upon the power of the House of Representatives to judge the qualifications of its own members under Article I, Section 5, and of Congress to regulate the time, place, and manner of holding elections under Article I, Section 4. *Id.* at 62. We pointed out in our brief that neither section applied to state legislative apportionment.

In the opinion in *Baker* v. *Carr*, the Court discussed the issue of justiciability at length. The Court held that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." 369 U.S. at 210. Since state legislative apportionment involved the States rather than a coequal branch of the federal government, the Court concluded that the issue was justiciable. *Id.* at 226.

It is true that Congressional districting involves a coequal branch of the federal government. Congress has the power under Article I, Sections 4 and 5 to remedy the evil of unequal districting either by refusing to seat persons elected pursuant to discriminatory districting or by passing a statute regulating population disparities between districts in a State. Thus, Congressional districting does involve a coordinate branch, Congress, in the sense that Congress has the power to remedy the evil. On the other hand, the actual discrimination involved in this case was pursuant to a state statute and therefore, because Congress has not acted in this field, there can be no actual interference with it. See p. 39 below.

While Congressional districting involves to some extent a coequal branch of the federal government, we submit that decisions of this Court establish that it does not raise a political question and is justiciable. *First*, neither the Constitution nor its history states or even suggests that the power of Congress is exclusive. Although the power is explicity conferred on Congress, so, for example, is the power of Congress to regulate commerce. Yet, since early in our history, this Court, independent of any statute, has struck down state activity interfering with commerce. *E.g., Gibbons* v. *Ogden*, 9 Wheat. 1. See Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39–40; Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L.J. 13, 21.

Second, in *United States* v. *Classic*, 313 U.S. 299, and *United States* v. *Saylor*, 322 U.S. 385, this Court held that miscounting votes and stuffing ballot boxes

violated Article I of the Constitution. Since those cases involved criminal prosecution of state election officials under the Civil Rights Act, the Court was required to find, in order to uphold the convictions, that a right guaranteed by the Constitution was violated. This Court found that the defendants had violated such a right and stated in *Classic* (313 U.S. at 315):

> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.

If Article I protects voters from dilution of voting power by miscounting votes and stuffing ballot boxes, it would seem that it also protects voters from the dilution of their voting power from maldistricting. See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1074–1076. Thus, we submit that even before the Fourteenth Amendment was adopted, the federal courts had authority to hold invalid Congressional districting which was not based on population. Since the adoption of the equal protection clause of the Fourteenth Amendment—a provision of the Constitution which the federal courts have repeatedly enforced in the absence of Congressional legislation—this power has been clear.

Third, in cases directly involving Congressional districting, the Court has repeatedly held that the legality of the districting is not a political question beyond the power of the federal courts of adjudicate. In numerous cases the Court has either accepted or

rejected challenges to Congressional districting by various States on the merits without even discussing the issue of justiciability. *Davis* v. *Ohio, supra; Smiley* v. *Holm, supra; Koenig* v. *Flynn, supra; Carroll* v. *Becker, supra; Wood* v. *Broom, supra.* In *Colegrove* v. *Green,* Mr. Justice Frankfurter, joined by two other Justices, would have held that state apportionment of Representatives is a political question beyond the power of the federal courts to decide. One of the reasons given was that Section 4 "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House." 328 U.S. at 554. But a majority of the participating Justices (Mr. Justice Rutledge, concurring, and the three dissenting Justices) took the view that the federal courts had the power to adjudicate the validity of the system of apportionment under attack. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, stated that the "effect [of *Smiley* v. *Holm*] is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U.S. at 565. However, he concluded that this power should be employed "only in the most compelling circumstances." *Ibid.* Since such circumstances were absent, he decided that "the case is one in which the Court may properly, and should decline to exercise its jurisdiction!"[*] *Id.* at 566.

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[*] At this point, Mr. Justice Rutledge quoted in a footnote from *American Federation of Labor* v. *Watson,* 327 U.S. 582, 593: "The power of a court of equity to act is a discretionary one * * *."

Fourth, after stating that justiciability and separation of powers are closely related, *Baker* v. *Carr* itself established that Congressional districting does not involve a political question. The Court stated that "*Smiley, Koenig,* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting." 369 U.S. at 232. The Court then stated that a majority of the Justices in *Colegrove* v. *Green* followed these precedents and held that the issue was justiciable. The discussion in *Baker* v. *Carr* was not dictum even though the issue before Court involved the justiciability of state legislative apportionment, not Congressional districting. The justiciability of Congressional districting was stated as part of the Court's reasoning that the apportionment of state legislatures likewise did not raise a political question.

Even if this Court had not explicitly stated that a challenge to the constitutionality of a State's Congressional districting is justiciable, that ruling would fairly follow from the holding in *Baker* v. *Carr*. There, this Court held that the apportionment of state legislatures did not raise a political question beyond the power of the federal courts. Two of the most serious arguments that state legislative apportionment was not justiciable were the alleged lack of substantive criteria under the Fourteenth Amendment in this area and the difficulty of finding an appropriate judicial remedy if the apportionment were determined to be unconstitutional. Both these problems are, if anything, less serious with relation to Congressional districting than state legislative apportionment.

The difficulty of finding a proper judicial remedy is less as to Congressional districting than as to state

legislative apportionment. In both situations, the courts could enjoin further elections on the existing basis or reapportion and redistrict the state. The third likely remedy, elections at large, however, presents serious difficulties as to a state legislature.* Legislative bodies frequently have 75 or more members and a statewide election would be extremely unwieldy. More important, legislators are intended to represent a portion of the people living in particular districts as contrasted to executive officials who are chosen by all the people. Thus, it is arguable that an election of an entire legislature at large interferes with the essence of the legislature as a representative body.

Election of all Congressmen from a particular State at large has few of these difficulties. The large majority of States have less than ten Representatives

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*In *Colegrove* v. *Green*, Mr. Justice Rutledge, concurring, cast doubt on the practicability of both judicial redistricting and elections at large to remedy discriminatory judicial districting, 328 U.S. at 565–566. He stated that judicial redistricting would require a court to lay out boundary lines without guidance except compactness of territory and approximate equality of population. In the government's brief in *Baker* v. *Carr*, we suggested that this task would be easier as to state legislative apportionment because county lines could be followed. Brief for the United States as Amicus Curiae on Reargument, *Baker* v. *Carr*, No. 6, 1961 Term, pp. 65, 75–78. However, just as in the case of state legislative apportionment, county and city lines may be followed as to Congressional districting except where a city is entitled by population to more than 1 seat. Mr. Justice Rutledge also said in *Colegrove* that elections at large might produce more inequities than it could cure by depriving residents of the State of representation by districts. As we show below (pp. 28–30), these apprehensions concerning elections at large are greatly exaggerated as to Congressional elections.

and, even in the more populous States, election at large would not be nearly so troublesome as such an election of an entire legislative body. Indeed, from 1791 until 1842 and from 1929 to 1941 there was no federal statute requiring the States to elect Congressmen from districts. Districting probably is not required today. See 2 U.S.C. 2a, App., *infra*, pp. 45–46; *Colegrove* v. *Green*, 328 U.S. 549, 555; *Wood* v. *Broom*, 287 U.S. 1; Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L.J. 13, 16, note 21. Indeed, 2 U.S.C. 2a provides for elections at large when a State's representation in Congress has been reduced and it fails to redistrict. If a State similarly fails to redistrict after its existing districts have been held unconstitutional, it is consistent with the policy of Section 2a to have elections at large. Such election of all of a State's representatives at large, particularly as a temporary matter, does not seriously interfere with the representative nature of the House of Representatives. The State would still be choosing Congressmen to join others elected from other States and districts throughout the country in a House made up of representatives of all the people.

States have been required by court orders to elect all their Congressmen at large on four different occasions. In *Smiley* v. *Holm*, 285 U.S. 355, 374, the Court stated that Minnesota's nine representatives could be elected at large and this was the result on remand. In *Carroll* v. *Becker*, 285 U.S. 380, 382, this Court affirmed a state court order requiring Missouri's thirteen representatives to be elected at large. The Virginia Supreme Court of Appeals has ordered that

that State's nine representatives must be elected at large (*Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105, 111) and a federal district court rendered a similar decision as to Kentucky's nine representatives (*Hume* v. *Mahan*, 1 F. Supp. 142 (E.D. Ky.)). In 1961, the Alabama legislature, faced with the problem of reducing that State's districts to eight as a result of the 1960 census, passed a statute providing for the election of Congressmen at large and this statute was upheld. *Alsup* v. *Mayhall*, 208 F. Supp. 713 (S.D. Ala.).

As to substantive standards, it is decisive that the Court held in *Baker* v. *Carr* that there was no lack of judicially manageable standards for determining whether a State's legislative apportionment violates the equal protection clause. The definition of the familiar constitutional standards in terms of apportionment and the resolution of any questions of degree arising in their application are matters now before the Court in pending cases. However the standards applicable to state legislative apportionment are defined, those applicable to Congressional districting must be at least as judicially manageable. Actually, we think, they will be simpler and more precise. None of the considerations which it is arguable may justify deviation from apportionment by population in the case of a state legislature are applicable to Congressional districting. While State policies are entitled to weight in apportioning State legislatures, they have little application in choosing federal officials.[10] Since the Constitu-

[10] Moreover, unlike the situation in the case of state legislative apportionment, there is no history of Congressmen representing political subdivisions. Each subdivision of the United States has obviously never been guaranteed a minimum of one Congressman to represent it.

tion makes plain that the House of Representatives was intended to represent population, it logically follows that each district within a State must be substantially equal in population.

The Constitution, as originally framed, provided that the Senate was to consist of two members from each State to be elected by the state legislatures. Art. I, Sec. 3. It further provided that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Art. V. Thus, it was clear that the Senate was intended to represent States. In contrast, the House of Representatives was to be elected directly by "the People of the several States" and that the apportionment between the States was to be based solely on population, with the only exception being that each State was entitled to a minimum of one. Art. I, Sec. 2. Thus, the House of Representatives was plainly intended to represent people. And the requirement that the apportionment between the States was to be according to population implies that this was also to be the sole standard within the States.

The history of the Constitution and its ratification strongly support this construction of Article I, Section 2. During debate at the constitutional convention in Philadelphia between the large and small States on representation in Congress, William Samuel Johnson of Connecticut described the compromise adopted as "in one branch the people, ought to be represented; in the other, the States." I *Records of the Federal Convention* (Farrand ed., 1911), p. 462. William Pierce of Georgia stated that he "was for an election by the people as to the 1st branch & by the States as to the 2d branch; by which means the citi-

zens of the States wd. be represented both individually & collectively." I *id.* at 137. See also I *id.* at 132 (James Wilson of Pennsylvania); II *id.* at 273 (James Mason of Virginia). In explaining Section 4 of Article I—which gives Congress the power to regulate "[t]he Times, Places and Manner of holding Elections"—James Madison made clear that it was intended to prevent abuses which might occur if the state legislatures controlled the elections. Among the abuses specifically mentioned was that "the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Nat'l. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter." II *id.* at 241. And Governor Randolph of Virginia explicitly stated that it was "inadmissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district." I *id.* at 579–580.

In Number 57 of *The Federalist Papers,* Madison plainly assumed that the States would district according to population in stating that "each representative of the United States will be elected by five or six thousand citizens." *The Federalist* (Cooke ed., 1961), p. 388). This forecast of the number of persons who actually would be entitled to vote in each district assumes that the districts will be fairly equal in population. See Hacker, *Congressional Districting* (1963), pp. 10–11. Later in the same paper, Madison remarked that "[t]he City of Philadelphia is supposed to contain between fifty and sixty thousand souls. It

will therefore form nearly two districts for the choice of Federal Representatives." *The Federalist, supra,* p. 389. This statement again assumed equal population in each Congressional district since the Constitution provided that States would receive a minimum of one Representative for each 30,000 people. And in Number 58, either Madison or Alexander Hamilton remarked that "one branch of the legislature is a representation of citizens, the other of the states * * *." *Id.* at 392.

Debate at the state ratifying conventions likewise reflected the intent of the framers that Congressional districting was to be based on population. In the Massachusetts convention, Rufus King and Francis Dana, who were delegates to the federal convention,[11] defended Article I, Section 4 as preventing Congressional districting by the States which was not based on population. They gave as examples of such unfair representation South Carolina, Connecticut, Rhode Island, and Great Britain. II *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Elliot editor, 2d ed., 1854), pp. 49–51. Dr. Charles Jarvis stated that the Constitution provided that "30,000 inhabitants were entitled to send a representative, and that wherever this number was found, they would have a right to be represented in the federal legislature."[12] II *id.* at 29. Madison again defended Article I, Section 4 in the Virginia convention by stating (III *id.* at 367):

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[11] Dana, however, was prevented by sickness from attending.

[12] Jarvis' statement is erroneous in part since the Constitution does not guarantee one representative for every 30,000 people, but a maximum of this ratio.

> [I]t was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by thirty members. Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.

Thus, Madison equated Congressional districting which gave citizens unequal power to elect Representatives with denial of the right of suffrage. John Steele defended Article I, Section 4 in the North Carolina convention against the claim that it would allow Congress to ensure the election of persons from the seacoast. He stated that Congress "may, and most probably will, lay the state off into districts" and that "[i]f the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them." IV *id.* at 71. In the South Carolina convention, Charles Cotesworth Pinckney, another delegate to the federal convention, said that it was "absolutely necessary that Congress should have this superintending power, lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state." IV *id.* at 303. He went on to say that "the House of Representatives will be

elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the state legislatures, and represent the states in their political capacity * * *" IV *id.* at 304.[13]

The Constitution and its history demonstrate convincingly that the House of Representatives was intended to represent the people directly and that Congressional districting within each State, like the apportionment between the States, was to be on this same basis. Conceivably, this was merely the framer's intention rather than a binding requirement of the Constitution. However, the adoption of the Fourteenth Amendment—with its guarantee "of the equal protection of the laws"—strongly indicates that Congressional districting must be based on population. For regardless of whether equal protection requires that both houses of a state legislature be based exclusively on population, the original framers made clear that equal protection, and indeed the basic fairness required by the due process clause, so required as to federal House of Representatives.

To summarize, we are not arguing that the Fourteenth Amendment imposes the substantive standard that Congressional districting must be based on population even though we believe that this standard is correct. Similarly, we do not believe that the Court

[13] The history of the Constitution with regard to representation in Congress is developed in further detail in Appendix B to the government's brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term. This history shows that the House of Representatives was intended to represent the people equally.

need decide whether the appropriate remedy in cases involving Congressional districting is an election at large. As we discuss more fully below (pp. 42–43), these matters have not been decided by the district court and we do not think that the Court should determine them at this time. Instead, all that we are saying is that appropriate substantive standards do exist which appear to be more readily ascertainable and administrable than in the case of state legislative apportionment and that a remedy is available which may be more practicable than those relating to state legislatures. Therefore, if, as the Court determined in *Baker* v. *Carr*, state legislative apportionment is justiciable in the federal courts, the same should be true as to Congressional districting. Indeed, as we have shown above (pp. 25–27), this Court has assumed justiciability in the area of Congressional districting in a series of cases and explictly so found in *Baker* v. *Carr*.

II

THE DISTRICT COURT ERRED IN DISMISSING THE ACTION FOR WANT OF EQUITY

While the district court held that the federal courts have, under this Court's decision in *Baker* v. *Carr*, the power to adjudicate the constitutionality of Congressional districting, it decided that this case should be dismissed for want of equity. The court reasoned that *Colegrove* v. *Green*, 328 U.S. 549, was "strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate

branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress" (R. 51). We submit that neither these, nor any other factors, justified the district court's determination.

The district court relied exclusively on *Colegrove* v. *Green* in dismissing the action for want of equity. In that case, the plurality opinion of Mr. Justice Frankfurther, who was joined by two other Justices, said that Congressional districting was a political question beyond the power of the federal courts. 328 U.S. at 554–556. Mr. Justice Rutledge, who cast the crucial vote, concluded that the Court should refuse to exercise its equitable discretion because "[t]he shortness of the time remaining [before the next election] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek." *Id.* at 565. In a subsequent case involving the Georgia county unit system, Mr. Justice Rutledge explained his position in *Colegrove* as based on the "particular circumstances" of that case. *Cook* v. *Fortson*, 329 U.S. 675, 678.

In the present case, the district court did not suggest that there was any difficulty arising from the imminence of an election. Moreover, there was ample opportunity, if the present districting were held unconstitutional, to give the Georgia legislature time to redistrict. That procedure has been followed in

numerous cases involving state legislature apportionment. *Sobel* v. *Adams*, 208 F. Supp. 316, 318 (S.D. Fla.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 259, and unreported opinion, September 5, 1962 (N.D. Ga.); *Baker* v. *Carr*, 206 F. Supp. 341, 349, 350–351 (M.D. Tenn.); *Moss* v. *Burkhart*, 207 F. Supp. 885, 894, 898–899 (W.D. Okla.); *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 195–196 (D. Neb.); *Mann* v. *Davis*, 213 F. Supp. 577, 585–586 (E.D. Va.), pending on appeal, No. 69, this Term; *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W.D. Wash.); *Sincock* v. *Duffy*, 215 F. Supp. 169, 191–192 (D. Del.), pending on appeal, No. 307, this Term; *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, 670–671; *Maryland Committee for Fair Representation* v. *Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962; *Harris* v. *Shanahan*, District Court, Shawnee County, Kansas, decided July 26, 1962; *Fortner* v. *Barnett*, No. 59,965, Chancery Court, First Judicial District, Mississippi. The time given the legislature to act could, if necessary, extend past the date of the next election. *League of Nebraska Municipalities* v. *Marsh*, *supra*, 209 F. Supp. at 195–196; *Toombs* v. *Fortson*, United States District Court for the Northern District of Georgia, decided October 19, 1962.

The reasons advanced by the district court for dismissing are all without merit. First, the district court said that the case involved a political question relating to a coordinate branch of the federal government. If the issue were wholly political, the case would have to be dismissed as non-justiciable (see the

discussion and cases cited in *Baker* v. *Carr, supra,* 369 U.S. at 211–229). As we have seen above (pp. 23–26), however, the issue is not political in that sense. Moreover, the district court's reasoning is inconsistent with Mr. Justice Rutledge's opinion in *Colegrove,* for that opinion, as was again explained in *Cook* v. *Fortson,* depended on the particular circumstances of the case. In contrast, if want of equity existed whenever a coordinate branch of government was involved, the federal courts could never decide cases of Congressional districting.

There was no danger of interference with the coordinate branch of the federal government. The federal courts have considered cases involving interference by the States with rights of citizens to vote in elections for Congress. *United States* v. *Classic,* 313 U.S. 299; *United States* v. *Saylor,* 322 U.S. 385 (see the discussion of these cases, pp. 24–25 above). Here, while elections to the House of Representatives are involved, there is no federal statute concerning the standards for Congressional districting. If what the district court meant was that Congress had power to act by disqualifying members from over-represented, under-populated districts and the court would therefore defer judicial action until Congress had the opportunity to exercise its power, then the court erred because history shows not the least prospect of Congressional action. In addition, this case involves as Judge Tuttle stated (R. 54), an attack on the Congressional districting statute passed by the Georgia legislature. Any interference which might result is

with a state statute—the same kind of interference which was involved in *Baker* v. *Carr* where this Court held that the "appellants are entitled to a trial and a decision." 369 U.S. at 237.

The second reason suggested by the district court was that the case involves a political question because it can be solved only by depriving other voters of the right to vote by district or by having the court redistrict the State. This contention is also without merit. The same remedies exist for unconstitutional Congressional redistricting as for unconstitutional state legislative apportionment—judicial redistricting, enjoining elections on the present basis, and elections at large. As we have seen above (pp. 27–30), the first two remedies are equally practicable in both situations, while elections at large are more appropriate with regard to Congressional districting. Georgia has only ten Congressmen. In four instances, courts have ordered States with eight to thirteen Congressmen to elect their Congressmen at large because their existing districting was invalid and twice this remedy was approved by this Court (see p. 29 above). None of these remedies, however, may ever be necessary since it is sufficient at this time for the federal courts to hold the present districting unconstitutional and give the legislature time to redistrict (see the cases cited pp. 37–38 above). If the legislature decides not to do so and the district court orders an election at large, it is the state legislature, not the federal courts, which is deciding that Georgia should elect its Representatives at large rather than by districts. Moreover, here again, the district court's reasoning

would apply to all cases of Congressional districting, which is inconsistent with Mr. Justice Rutledge's opinion in *Colegrove* that the want of equity resulted from the particular circumstances of the case.

The district court's third justification for dismissal was that the state legislature might change the Congressional districting. This hope was based on the fact that, after a federal court holding that the Georgia legislature was unconstitutionally apportioned (*Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga.), the legislature reapportioned the Senate. However, as Chief Judge Tuttle stated in his dissent (R. 51–53, 54–55), there is no reason why this should mean that the action should be dismissed. Instead, the district court should have decided whether the existing districting was unconstitutional;[14] it could then have withheld further relief until the legislature had time to act. This would have fully protected the important interest in having the State decide for itself how its Congressmen are to be elected, while still ensuring the constitutional rights of the appellants. In contrast, the district court's decision means that, if the Georgia legislature fails to act, the appellants must bring an entirely new action which will certainly result in additional and unnecessary delay in the vindication of their constitutional rights.

Finally, the district court indicated that Congress might provide relief by passing a statute regulating districting. However, the Court did not suggest on what information this hope was based. Such action

[14] While the court said that the existing system was arbitrary (R. 45), it is not clear whether it believed the districting was unconstitutional (see pp. 42–43 below).

is highly unlikely since Congress itself reflects the discriminatory districting now existing in many States (see, *e.g.*, R. 139). In fact, Congress has not legislated on this subject since 1911 and that statute was superseded in 1929. Act of August 8, 1911, 37 Stat. 13; *Wood* v. *Broom*, 287 U.S. 1. Repeated efforts have been made in Congress in recent years to require the States to district on the basis of population, but without success. See Dixon, *Legislative Apportionment and the Federal Constitution*, 27 Law & Contemp. Problems 329, 349. There is no reason to believe that the likelihood of legislation is any greater at the present time. Furthermore, even if there were a reasonable likelihood that Congress would act, the district court should have adjudicated the merits and then waited a reasonable period of time before issuing an injunction in order to allow Congress to act.

In short, the issues in this case concerning Congressional districting are just as susceptible to judicial determination as those of state legislative apportionment involved in *Baker* v. *Carr*. In the latter case, this Court held that the plaintiffs were entitled to a trial and adjudication of their claim that the apportionment violated the Fourteenth Amendment. Plaintiffs are equally entitled to an adjudication of their constitutional rights by the district court in this case.

III

THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR DETERMINATION OF THE MERITS

We have shown above that the federal courts have power to consider whether Congressional districting

violates the Fourteenth Amendment and that the district court should have decided this question in this case. In fact, however, the district court dismissed for want to equity. It is true that the court stated that the districting "has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard" (R. 45). On the other hand, the court said that "from the standpoint of the Fourteenth Amendment rights or the right to choose Representatives under Art. I, Section 2, of the Constitution, we do not now find proscribed invidiousness" (R. 45). The court then stated that, assuming the action was not dismissed for want of equity, it would have retained jurisdiction "to again *consider* the contentions of plaintiffs, if necessary, after the expiration of a reasonable time for relief by way of political remedy" (emphasis added) (R. 45). Thus, the court's view of the merits of this case is not at all clear. Furthermore, its statements on this issue are merely dictum, not a fully considered determination of the merits.

We do not believe that the substantive issue in this case should be decided initially by this Court. This issue, while analogous to that involved in the cases now before the Court involving the apportionment of state legislatures is, as we have seen (pp. 27–36), different in several respects. Thus, the question is one of first impression in this Court. We therefore submit that

the case should be remanded to the district court for full consideration and determination of the merits.[15]

CONCLUSION

For the foregoing reasons, we submit that the three-judge court had power to consider the issues presented, and that this is an appropriate case for a federal court to exercise its equitable discretion and consider the alleged violation of the Fourteenth Amendment. We urge, therefore, that the judgment below be reversed and the case remanded to the three-judge court for consideration on the merits.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

BRUCE J. TERRIS,
Assistant to the Solicitor General.

RICHARD W. SCHMUDE,
Attorney.

SEPTEMBER 1963.

[15] Appellees in their motion to affirm or dismiss with supporting brief, pp. 38–45, suggest that the case is moot because the 1962 Congressional elections have been held. However, since the relief appellants seek specifically applies to future elections as well (R. 13), the case is plainly not moot.

APPENDIX

Section 2a of Title 2 U.S.C. provides:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall de-

volve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Section 2301 of Title 34 Georgia Code (1962) provides:

Congressional districts.—The State is hereby divided into 10 congressional districts, in conformity with the Act of Congress of the United States approved June 18, 1929, decreasing the

number of Congressmen from Georgia to 10, each of said districts being entitled to elect one Representative to the Congress of the United States. The districts shall be composed of the following counties, respectively:

First District: Bryan, Bulloch, Burke, Candler, Chatham, Effingham, Emanuel, Evans, Jenkins, Liberty, Long, McIntosh, Montgomery, Screven, Tattnall, Toombs, Treutlen, and Wheeler.

Second District: Baker, Brooks, Calhoun, Colquitt, Decatur, Dougherty, Early, Grady, Miller, Mitchell, Seminole, Tift, Thomas, and Worth.

Third District: Ben Hill, Chattahoochee, Clay, Crisp, Dodge, Dooly, Harris, Houston, Lee, Marion, Macon, Muscogee, Pulaski, Quitman, Randolph, Schley, Stewart, Sumter, Taylor, Peach, Terrell, Turner, Webster, and Wilcox.

Fourth District: Butts, Carroll, Clayton, Coweta, Fayette, Heard, Henry, Lamar, Meriwether, Newton, Pike, Spalding, Talbot, Troup, and Upson.

Fifth District: DeKalb, Fulton, and Rockdale.

Sixth District: Baldwin, Bibb, Bleckley, Crawford, Glascock, Hancock, Jasper, Jefferson, Jones, Johnson, Laurens, Monroe, Putnam, Twiggs, Washington, and Wilkinson.

Seventh District: Bartow, Catoosa, Chattooga, Cobb, Dade, Douglas, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield.

Eighth District: Atkinson, Appling, Bacon, Berrien, Brantley, Camden, Charlton, Clinch, Coffee, Cook, Echols, Glynn, Irwin, Jeff Davis, Lanier, Lowndes, Pierre, Telfair, Ware, and Wayne.

Ninth District: Banks, Barrow, Cherokee, Dawson, Fannin, Forsyth, Gilmer, Gwinnett,

Habersham, Hall, Jackson, Lumpkin, Pickens, Rabun, Towns, Stephens, Union, and White.

Tenth District: Clarke, Columbia, Elbert, Green, Hart, Lincoln, Madison, McDuffie, Morgan, Oconee, Oglethorpe, Richmond, Taliaferro, Walton, Warren, Wilkes, and Franklin.

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